

**United States Department of Labor
Employees' Compensation Appeals Board**

J.L., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Jamaica, NY, Employer**

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**Docket No. 20-1559
Issued: August 5, 2021**

Appearances:

*Thomas S. Harkins, Esq., for the appellant¹
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On August 27, 2020 appellant, through counsel, filed a timely appeal from a March 5, 2020 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.³

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that, following the March 5, 2020 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal. 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

ISSUE

The issue is whether appellant has met her burden of proof to establish a medical condition causally related to the accepted November 26, 2011 employment incident.

FACTUAL HISTORY

This case has previously been before the Board.⁴ The facts and circumstances as set forth in the Board's prior decisions are incorporated herein by reference. The relevant facts are as follows.

On November 27, 2011 appellant, then a 53-year-old express mail clerk, filed a traumatic injury claim (Form CA-1) alleging that on November 26, 2011 she was carrying heavy bags and placing them into a postal container when she felt pain in her left leg and hip while in the performance of duty.

By decision dated March 14, 2012, OWCP denied appellant's claim. It found that the medical evidence submitted was insufficient to establish a firm medical diagnosis in connection with the accepted November 26, 2011 employment incident. OWCP noted that appellant's physician diagnosed low back, left thigh and hip pain; however, pain was a symptom, not a medical diagnosis.

On March 29, 2012 appellant requested a review of the written record by a representative of OWCP's Branch of Hearings and Review and submitted additional medical evidence. By decision dated July 11, 2012, the hearing representative affirmed the March 14, 2012 decision.

Appellant, through counsel, subsequently submitted multiple requests for reconsideration. By decisions dated June 14, 2013, and February 19, July 8, and December 12, 2014, OWCP denied modification of its prior decisions.

On March 3, 2015 appellant, through counsel, appealed to the Board. By decision dated January 15, 2016, the Board found that appellant had not met her burden of proof to establish that her left hip and back conditions were causally related to the accepted November 26, 2011 employment incident.⁵

On January 3, 2017 appellant, through counsel, requested reconsideration and submitted additional medical evidence.

A November 29, 2016 magnetic resonance imaging (MRI) scan of appellant's left hip read by Dr. Jonathan S. Luchs, a Board-certified diagnostic radiologist, demonstrated left greater trochanteric bursitis, left gluteus medius tendinitis with intrasubstance longitudinal partial tear without full-thickness tear, and insertional left gluteus medius tendinosis without full-thickness tear.

⁴ Docket No. 15-0830 (issued January 15, 2016), *petition for recon. denied*, Docket No. 15-0830 (issued August 19, 2016); Docket No. 17-1460 (issued December 21, 2018), *petition for recon. denied*, Docket No. 17-1460 (issued April 22, 2019).

⁵ *Id.*

In a December 27, 2016 narrative report, Dr. Carlos Montero, a Board-certified orthopedic surgeon, noted that appellant's injury occurred while she was carrying and lifting heavy bags and placing the heavy bags into a postal container. He noted that appellant initially saw Dr. Andrew D. Brown, a Board-certified internist, who diagnosed a strain of the left hip with traumatic bursitis and iliotibial band syndrome with aggravation of degenerative joint disease. Dr. Montero related that appellant had a previous work-related injury on August 10, 2009, when a heavy box struck her right foot, causing a contusion of the right foot, a lumbar sprain, and a right foot crushing injury. He noted that the prior injury involved her right lower extremity and lumbar spine and that appellant was examined by him for the first time on November 10, 2016, with the chief complaint of severe pain in the left trochanteric region related to the left thigh and knee. Dr. Montero examined appellant and provided findings which included a history of left hip pain localized in the left thigh. He also indicated that the examination disclosed full range of motion (ROM) in the left hip, but painful at extremes. Dr. Montero noted that appellant walked with a cane due to the pain in her left thigh and that an examination of the hip disclosed no evidence of contractions. He related that appellant had an intact neurovascular examination, her x-rays were unremarkable, and an MRI scan of the left hip revealed greater trochanteric bursitis, left gluteus medius tendinitis with intrasubstance longitudinal partial tear, and left gluteus medius tendinitis. Dr. Montero diagnosed chronic left greater trochanteric bursitis unresponsive to treatment with gluteus medius tendinosis. He opined that appellant's condition was related to her work injury on November 26, 2011. Dr. Montero advised that her condition was permanent, that she might require surgery, and that she was totally disabled from work.

By decision dated March 24, 2017, OWCP denied modification of its January 15, 2016 decision.

On June 19, 2017 appellant, through counsel, filed an appeal to the Board. By decision dated December 21, 2018, the Board found that appellant had not met her burden of proof to establish that her left hip or low back conditions were causally related to the accepted November 26, 2011 employment incident.⁶

In a March 4, 2019 hospital report, Dr. Tadeusz Korszun, Board-certified in emergency medicine, noted that appellant was seen for left hip pain.

A March 4, 2019 report from a physician assistant assessed calcific bursitis of the left trochanter region. March 4, 2019 x-rays of the hip and femur revealed calcific bursitis on the left greater trochanteric region and no acute fracture or dislocation.

On December 6, 2019 appellant, through counsel, requested reconsideration and submitted additional evidence. The additional evidence consisted of copies of previously submitted reports which included a June 7, 2018 MRI scan of the lumbosacral spine, a copy of a November 29, 2016 MRI scan of the left hip, and an April 3, 2014 report from Dr. Brown.

By decision dated March 5, 2020, OWCP denied modification of its prior decision.

⁶ *Supra* note 4.

LEGAL PRECEDENT

A claimant seeking benefits under FECA⁷ has the burden of proof to establish the essential elements of his or her claim, including that the individual is an employee of the United States within the meaning of FECA, that the claim was timely filed within the applicable time limitation of FECA, that an injury was sustained in the performance of duty as alleged, and that any specific condition or disability claimed is causally related to the employment injury.⁸ These are the essential elements of each and every compensation claim, regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.⁹

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it first must be determined whether fact of injury has been established. First, the employee must submit sufficient evidence to establish that he or she actually experienced the employment incident at the time, place, and in the manner alleged. Second, the employee must submit sufficient evidence to establish that the employment incident caused a personal injury.¹⁰

The medical evidence required to establish causal relationship is rationalized medical opinion evidence.¹¹ The opinion of the physician must be based on a complete factual and medical background of the employee, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and specific employment incident identified by the employee.¹²

ANALYSIS

The Board finds that appellant has not met her burden of proof to establish a medical condition causally related to the accepted November 26, 2011 employment incident.

Preliminarily, the Board notes that it is unnecessary for the Board to consider the evidence appellant submitted prior to March 24, 2017 as the Board considered that evidence in its January 15, 2016 and December 21, 2018 decisions and found that appellant had not met her burden of proof to establish an injury causally related to the accepted November 26, 2011

⁷ *Supra* note 2.

⁸ See *V.L.*, Docket No. 20-0884 (issued February 12, 2021); *L.C.*, Docket No. 19-1301 (issued January 29, 2020); *J.H.*, Docket No. 18-1637 (issued January 29, 2020); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

⁹ *P.A.*, Docket No. 18-0559 (issued January 29, 2020); *K.M.*, Docket No. 15-1660 (issued September 16, 2016); *Delores C. Ellyett*, 41 ECAB 992 (1990).

¹⁰ *T.J.*, Docket No. 19-0461 (issued August 11, 2020); *K.L.*, Docket No. 18-1029 (issued January 9, 2019); *John J. Carlone*, 41 ECAB 354 (1989).

¹¹ *S.S.*, Docket No. 19-0688 (issued January 24, 2020); *A.M.*, Docket No. 18-1748 (issued April 24, 2019); *Robert G. Morris*, 48 ECAB 238 (1996).

¹² *T.L.*, Docket No. 18-0778 (issued January 22, 2020); *Y.S.*, Docket No. 18-0366 (issued January 22, 2020); *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

employment incident. Findings made in prior Board decisions are *res judicata* absent any further review by OWCP under section 8128 of FECA.¹³

Appellant subsequently submitted reports dated March 4, 2019, in which Dr. Korszun noted that appellant was seen for left hip pain. However, as the Board has held, pain is a symptom, not a specific medical diagnosis.¹⁴ It is appellant's burden of proof to obtain and submit medical documentation containing a firm diagnosis.¹⁵ This report is, therefore, insufficient to establish appellant's claim.

A March 4, 2019 report from a physician assistant indicated a diagnoses of left trochanteric bursitis. However, the Board has previously explained that reports from a physician assistant do not constitute competent medical evidence because physician assistants are not considered physicians as defined under FECA.¹⁶ This report is, therefore, also insufficient to establish appellant's claim.

March 4, 2019 x-rays of the hip and femur revealed calcific bursitis on the left greater trochanteric region and no acute fracture or dislocation. The Board has held that diagnostic studies standing alone lack probative value, as they do not address whether the employment incident caused a diagnosed condition.¹⁷ This report is, therefore, insufficient to establish causal relationship between appellant's diagnosed condition and the accepted November 26, 2011 employment incident.

The Board, therefore, finds that appellant has not met her burden of proof as there is no medical evidence of record which contains a rationalized medical opinion of how the November 26, 2011 employment incident caused or aggravated a medical condition.¹⁸ Thus, appellant has not met her burden of proof.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

¹³ See *S.M.*, Docket No. 19-1961 (issued January 28, 2021); *V.G.*, Docket No. 19-0038 (issued June 18, 2019); *B.W.*, Docket No. 17-0366 (issued June 7, 2017); *Clinton E. Anthony, Jr.*, 49 ECAB 476 (1998).

¹⁴ See *C.W.*, Docket No. 19-0468 (issued July 16, 2019); *E.M.*, Docket No. 18-1599 (issued March 7, 2019); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Fact of Injury*, Chapter 2.803.4a(6) (August 2012) (findings of pain or discomfort alone do not satisfy the medical aspect of the fact of injury medical determination).

¹⁵ *E.M.*, *id.*

¹⁶ Section 8101(2) of FECA provides that physician includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law. 5 U.S.C. § 8101(2); 20 C.F.R. § 10.5(t). See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3a(1) (January 2013); *David P. Sawchuk*, 57 ECAB 316, 320 n.11 (2006) (lay individuals such as physician assistants, nurses, and physical therapists are not competent to render a medical opinion under FECA); see also *C.K.*, Docket No. 19-1549 (issued June 30, 2020) (physician assistants are not considered physicians under FECA).

¹⁷ See *J.S.*, Docket No. 19-0345 (issued August 11, 2020); *J.S.*, Docket No. 17-1039 (issued October 6, 2017).

¹⁸ See *C.C.*, Docket No. 17-1841 (issued December 6, 2018); *George Randolph Taylor*, 6 ECAB 986, 988 (1954) (where the Board found that a medical opinion not fortified by medical rationale is of little probative value).

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish a medical condition causally related to the accepted November 26, 2011 employment incident.

ORDER

IT IS HEREBY ORDERED THAT the March 5, 2020 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 5, 2021
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board